FILE COPY

No. 347

Supreme Court, U. S.
FILED
SEP 15 1947
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

GENERAL MOTORS ACCEPTANCE CORPORATION,

Petitioner,

v.

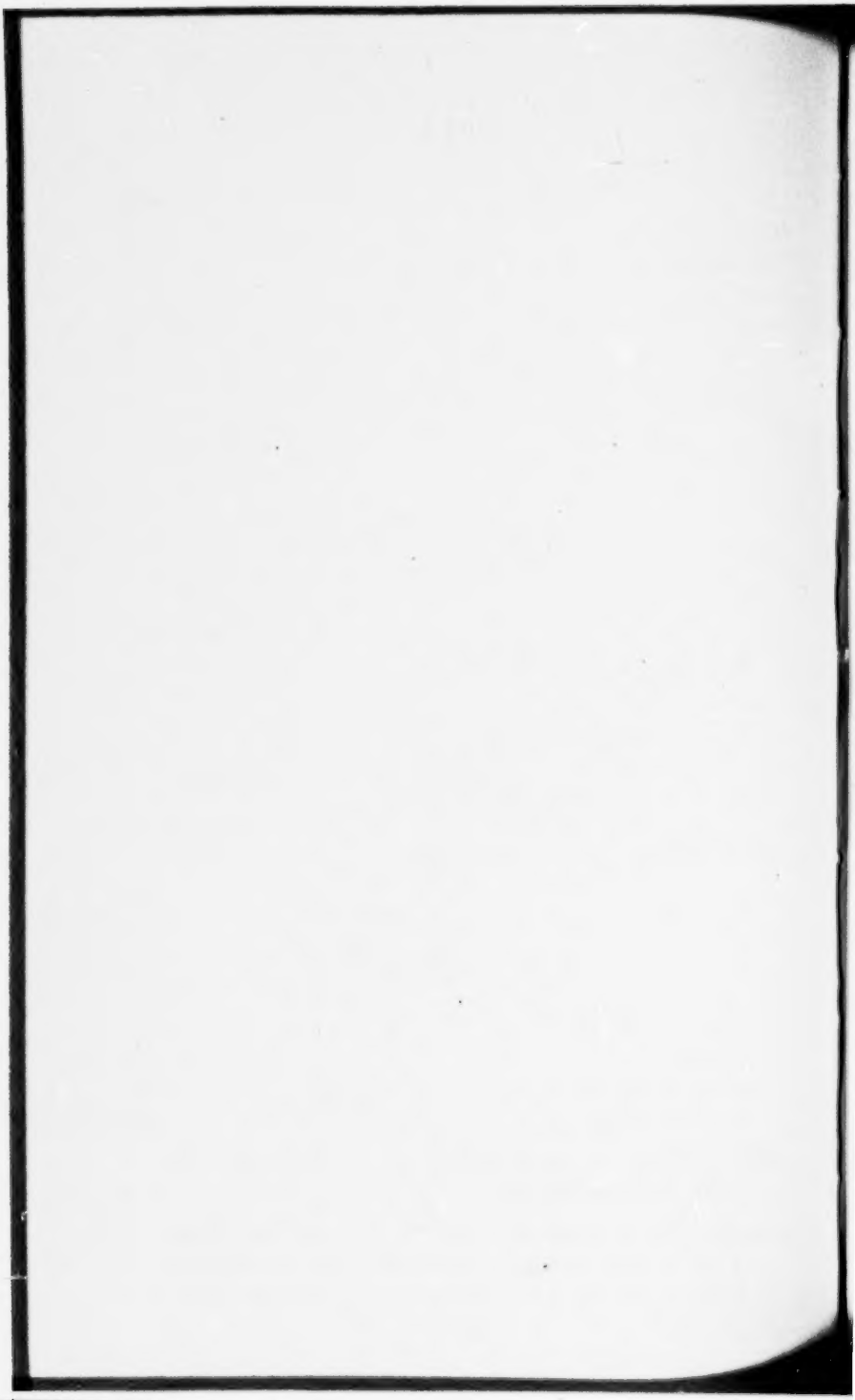
JOSEPH T. HIGGINS, Collector of Internal Revenue for the Third District of New York,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

JOHN THOMAS SMITH,
Counsel for Petitioner.

THE COURT PRESS, N. Y. C.



INDEX.

	PAGE
Opinions Below	1
Jurisdiction	1
Statute Involved	2
Question Presented	2
Statement	2
Reasons for Granting the Writ	5
Conclusion	15

TABLE OF CASES CITED:

Bellefield Co. v. *Heiner*, 25 F. 2d 560	5, 6
Dauphin Deposit Trust Co. v. *United States*, 80 F. 2d 893	5
Hamilton National Bank of Chattanooga v. *United States*, 99 F. 2d 570	5, 6
Lederer v. *Fidelity Trust Co.*, 267 U. S. 17	6
Motter v. *Bankers Mortgage Co.*, 93 F. 2d 778	5
Royal Loan Co., et al. v. *United States*, 154 F. 2d 556.	5
United States v. *American Trust & Banking Co.*, 125 F. 2d 113	5
Willcuts v. *Investors' Syndicate*, 57 F. 2d 811	5

OTHER AUTHORITIES CITED:

Internal Revenue Code:	
Section 23 (k)	10, 13
Section 117 (f)	11
Section 117 (i)	11
Section 1801	10*n*
Judicial Code, as amended by Act of February 13, 1925, Section 240 (a)	2
Revenue Act of 1926, Schedule A—Stamp Tax, Title VIII (C. 27, 44 Stat. 101, as amended by Section 721 (a), C. 209, Act of June 6, 1932, 47 Stat. 272).	2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

GENERAL MOTORS ACCEPTANCE CORPORATION,

Petitioner,

v.

JOSEPH T. HIGGINS, Collector of Internal Revenue for the Third District of New York,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

John Thomas Smith, on behalf of General Motors Acceptance Corporation, prays that a writ of certiorari issue to review the judgment entered in this case on May 14, 1947, by the United States Circuit Court of Appeals for the Second Circuit, reversing a judgment entered in the United States District Court for the Southern District of New York in favor of the petitioner for the refund of certain documentary stamp taxes.

Opinions Below.

The opinion of the Circuit Court of Appeals (R., p. 87) is reported in 161 F. 2d 593. The opinion of the District Court is reported in 60 F. Supp. 979.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered May 14, 1947 (R., p. 95). The jurisdiction

of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. The time for filing this petition was extended by Mr. Justice Jackson to September 15, 1947.

Statute Involved.

Schedule A—Stamp Tax, Title VIII of the Revenue Act of 1926 (C. 27, 44 Stat. 101, as amended by Section 721 (a), C. 209, Act of June 6, 1932, 47 Stat. 272) which imposes a tax on:

> "1. Bonds of indebtedness: On all bonds, debentures or certificates of indebtedness issued by any corporation, and all instruments however termed, issued by any corporation with interest coupons or in registered form, known generally as corporate securities, on each $100 of face value or fraction thereof, 10 cents * * *."

Question Presented.

Whether corporate instruments issued without interest coupons or registration, as evidences of indebtedness to a small group of corporate lenders, in large denominations and for their own private investment purposes, are taxable under the statute as bonds, debentures or certificates of indebtedness.

Statement.

Petitioner instituted this action for the refund of $25,000 paid under protest by it as a documentary stamp tax on $25,000,000 of instruments purporting to be promissory notes issued in 1935 without interest

coupons or registration. The salient facts pertaining to those instruments are as follows:

Pursuant to resolutions of its Board of Directors authorizing the private borrowing of approximately $30,000,000 for its business needs, petitioner issued eighty-four instruments, designated as 3¼% promissory notes, in the aggregate principal sum of $25,000,000 to five insurance companies and three other corporate lenders (R. 231-233). Allowing for differences in certain details applicable to each of the eight lenders, all of the instruments were identical as to the form, terms and privileges contained in the specimen which appears in the record (R. 19, 158, 233). These unsecured instruments ranged in face amounts from $100,000 to $1,000,000 (R. 234). Some of them were payable to the order of the designated holder, and others, consisting of a majority of them, were payable to bearer (R. 235).

The instruments were consecutively numbered for petitioner's identification of them in its own private tabulation of the details involved in the various instruments issued to each of the eight lenders (R. 160), and they bore the corporate seal. They contained provisions for acceleration and for redemption before maturity, and provided further that the petitioner would not, so long as they were outstanding, "at any time pledge or otherwise subject to a lien any of its property or assets without thereby expressly securing the due and punctual payment" of each of the instruments "equally and ratably with any and all obligations and indebtedness secured by such pledge or other lien".

Seventy-nine of the instruments were issued at intervals in the month of January 1935, while the re-

maining five were issued in June of the same year to two of the insurance companies. The maturity date of the instruments was either November 1 or December 1, 1939, or approximately two months short of five years from the date of issue, except as to seventeen of them which matured February 1, 1940, or about a month more than five years from the date of issue (R. 238, 239).

There is no provision in any of the instruments for interest coupons, and in fact none of them was issued with any interest coupons; on the contrary, each of the instruments provided for notation thereon of payment of interest (R. 237). There is no provision in any of the instruments for registration; none of them was issued in registered form, and none was in fact registered (R. 236). They were not issued under or pursuant to any trust indenture (R. 237). Each of the eight companies to whom the instruments were issued executed an agreement in which they represented that the obligations were being purchased by them for investment and not for resale or distribution to the public (R. 143). The petitioner received from the Securities Exchange Commission an expression of opinion that the instruments then proposed to be issued would not constitute a public offering and would be exempt, therefore, from any registration requirement under the Securities Act if, as was the fact, they were issued to an insubstantial number of people, which in this case turned out to be eight companies (R. 166).

Petitioner issued the instruments without paying a documentary stamp tax under Schedule A1 of the statute, on the ground that they were not taxable thereunder. The Commissioner of Internal Revenue thereafter assessed and made demand for payment

of a tax on the instruments, claiming that they were in the general class of taxable corporate securities, and subsequently disallowed and rejected the petitioner's claim for refund (R. 241-243).

Reasons for Granting the Writ.

1. The decision below is in conflict with the decisions of other lower courts, which are authority for the proposition that an essential element of the type of instruments marked for the tax under the statute is that they be issued with interest coupons or in registered form. That view of the statute controls the result reached in those cases where the instruments have, as well as where they have not, been held taxable. *Bellefield Co.* v. *Heiner,* 25 F. 2d 560; *Royal Loan Co., et al.* v. *United States,* 154 F. 2d 556; *United States* v. *American Trust & Banking Co.,* 125 F. 2d 113; *Willcuts* v. *Investors' Syndicate,* 57 F. 2d 811; *Hamilton National Bank of Chattanooga* v. *United States,* 99 F. 2d 570; *Motter* v. *Bankers Mortgage Co.,* 93 F. 2d 778; *Dauphin Deposit Trust Co.* v. *United States,* 80 F. 2d 893. The Third Circuit Court, in *Bellefield Co.* v. *Heiner, supra,* holding that instruments purporting to be notes and issued without coupons or registration were not taxable as bonds and that such conclusion was in harmony with Treasury Regulations and Decisions, emphasized that "the critical parts" of the "more or less complete definition of taxable instruments under the heading of bonds" is "that an instrument taxable as a bond must be issued by a corporation with interest coupons or in registered form". In *Royal Loan Co.* v. *United States, supra,* the Eighth Circuit Court, refusing to allow the defendant's alleged reason for

issuing the instruments involved there in registered form to relieve them from taxability as registered instruments, distinguished them from the non-taxable notes in *Bellefield Co.* v. *Heiner, supra,* because the latter were issued neither with interest coupons nor in registered form.

Those decisions indicate plainly that, where the corporate instruments have been held taxable, the tax has fallen only on instruments issued with coupons or in registered form, whether they were the mortgage participation certificates in *Hamilton National Bank* v. *United States, supra,* or the equipment trust certificates in *Lederer* v. *Fidelity Trust Co.*, 267 U. S. 17, or any other type of instruments. Until the lower court in this case, ignoring those decisions in the process of reversing the District Court, held the instruments involved here to be taxable even though they were not issued with interest coupons or in registered form, the decisions of the other lower courts had effectually established, for stamp tax purposes, a significant distinction between those corporate instruments which are and those which are not issued with coupons or in registered form. In this case the distinction is marked by the fact that, because the instruments were issued in large denominations of not less than $100,000 in any event, to a handful of lenders to be held for their own private investment purposes, they are the very antithesis of the type of instruments signified by the reference to instruments issued with coupons or in registered form.

The lower court in this case held that these instruments are taxable as debentures even though issued without coupons or registration. In so doing it recog-

nized that, for all that they contain a provision for acceleration or for redemption or prepayment or for certain credit safeguards or for a five-year term as against a shorter period, they are none the less promissory notes. However, it held them taxable, even though issued without coupons or registration, because it deemed them to be debentures, not ordinary promissory notes. In other words, instruments which would not otherwise be taxable because they are issued without coupons or registration become taxable nevertheless when, according to the court's conception, they are debentures.

Since, considered by themselves and independent of the context supplied by the remainder of the sentence, the words "bonds, debentures or certificates of indebtedness" have no defined meaning in the statute, the decisive criterion for application of the tax under the decision in this case is, not the objective standard reflected in the expressed concept of instruments "issued by any corporation with interest coupons or in registered form, known generally as corporate securities" which necessarily constitutes the predicate of the decisions in the other lower courts and explains bonds and debentures as exemplifying that general class of instruments, but rather some unexpressed concept of bonds and debentures according to such standards as may be found outside the statute. We believe there is no indication whatever in the statute that Congress intended to leave the question of taxability of corporate instruments to be determined by the question whether and to what extent they resemble bonds or debentures according to standards as variable, vague and elusive as those upon which this lower court depended.

At the bottom of the conflict created by the decision of the lower court in this case lies a dispute

over the meaning of the words "bonds, debentures or certificates of indebtedness" as taxable instruments and their relation to the remainder of the sentence comprising Schedule A1. The basic question to be determined from the language of Schedule A1 is whether, when it employed those words, Congress intended to refer to instruments somehow distinguishable, according to unexpressed concepts or connotations, from corporate instruments issued with interest coupons or in registered form and thereby identified as corporate securities, or whether, as petitioner claims, "bonds, debentures or certificates of indebtedness" are species of the genus "corporate securities" identified in the same sentence as instruments issued with coupons or in registered form, be they characterized as bonds or by any other name, and they therefore typify the class of instruments known as corporate securities.

The question whether instruments issued without coupons or registration are bonds or debentures, within the unexpressed meaning of those words standing by themselves and shorn of any contextual meaning contributed to them by the remainder of the sentence, is not pertinent to their taxability under this statute unless Congress can be said to have referred to bonds and debentures as categories of taxable corporate instruments separate and distinct from all instruments which, however termed, possess the characteristics of interest coupons or registered form identified with corporate securities. The imposition of a tax on corporate instruments as bonds or debentures even though issued without coupons or registration necessarily involves the assumption that bonds and debentures are not corporate securities; but if Schedule A1 were construed by reading

bonds and debentures as coordinates of notes or any other instruments, however termed, issued by a corporation with interest coupons or in registered form, the determinative factor would be, not whether they are bonds or debentures or notes, but whether, whatever they may be termed, they are issued with coupons or in registered form and are thus identified as corporate securities. Thus, the lower court conceded that if "the statutory phrase 'issued by any corporation with interest coupons or in registered form' qualifies all the preceding words in the section and not merely" the words "all instruments however termed" immediately preceding it, "the decision below should be affirmed despite our holding that these 'notes' were debentures for they would not be taxable debentures within the statute because they were issued neither with interest coupons nor in registered form".

The lower court adopted the Government's contention that Schedule A1 is to be construed as dividing taxable corporate instruments into two independent categories, one of which comprises "bonds, debentures or certificates of indebtedness" upon which, without any definition, the statute imposes the tax regardless of the fact that they are not issued with interest coupons or in registered form, and the other comprising "all instruments however termed, issued by any corporation with interest coupons or in registered form, known generally as corporate securities", and as meaning, therefore, that bonds and debentures are not included among the instruments known generally as corporate securities. The consequence is that, if corporate instruments which could not be taxed under the second category, because they are issued without interest coupons or registration, fit the court's

conception of debentures according to standards other than those specified in the statute, they become taxable even though issued without coupons or registration.

Petitioner submits that the construction adopted by the lower court is unjustifiable and results in the taxability of corporate instruments which were not intended to be taxed, because they are not instruments issued with coupons or in registered form, and which for the same reason would not be taxed under previous decisions. The intention to tax instruments which, by whatever name they might be called, comprise that classification of instruments identified as issued with coupons or in registered form and known as corporate securities so clearly emerges from and dominates the scheme and meaning of Schedule A1 as to make it evident that bonds and debentures represent types of all instruments possessing the designated characteristics identified with instruments therein intended to be taxed.

This view of the language is significantly illuminated and analogously demonstrated in several other provisions of the Internal Revenue Code.* Under our construction of Schedule A1, bonds and debentures bear the same coordinate relation to other "instruments issued by any corporation with interest coupons or in registered form, known generally as corporate securities" that they explicitly and expressly possess, for example, in Sec. 23 (k), where the Code, in dealing with allowable deductions from gross income for securities which become worthless and are capital assets, provides under (3) that "the term

* The Internal Revenue Code incorporates the stamp tax under discussion in section 1801. There, the original caption heading of "Bonds of indebtedness" now refers to the instruments affected by the tax as "Bonds, etc."

'securities' means bonds, debentures, notes, or certificates, or other evidences of indebtedness, issued by any corporation (including those issued by a government or political subdivision thereof), with interest coupons or in registered form", and under (5) in the same section, that "Bonds, debentures, notes or certificates, or other evidences of indebtedness issued with interest coupons or in registered form by any corporation affiliated with the taxpayer shall not be deemed capital assets" for that purpose.

Again, under the heading of "Retirement of Bonds, etc." Sec. 117 (f) of the Code provides that "For the purposes of this chapter, amounts received by the holder upon the retirement of bonds, debentures, notes, or certificates of indebtedness issued by a corporation (including those issued by a government or political subdivision thereof), with interest coupons or in registered form, shall be considered as amounts received in exchange therefor". Under the heading "Bond, etc., Losses of Banks", Sec. 117 (i) deals with the question of capital assets in the case of a bank's sale or exchange "of bonds, debentures, notes, or certificates, or other evidences of indebtedness issued by any corporation (including one issued by a government or political subdivision thereof) with interest coupons or in registered form".

Those provisions bear eloquent and convincing testimony to the fact that Congress conceived of and referred to bonds, debentures and certificates of indebtedness as species of all instruments issued by any corporation with interest coupons or in registered form, on a par with notes or any other similar instruments similarly issued, and that in the more modern enactment it made expressly clear that conception of bonds and debentures for which we claim Schedule A1 stands.

The lower court, in rejecting the construction advocated there by the petitioner, was impressed by the fact that prior to 1918 the words "bonds, debentures or certificates of indebtedness" constituted the only identification of instruments subject to the tax under Schedule A1, and by the fact that the language of that portion of the statute was then extended by the addition of the words, which constitute part of the 1926 statute under which this case arises, "and all instruments however termed, issued by any corporation with interest coupons or in registered form, known generally as corporate securities". The conclusion, that "this change was not to restrict taxation but was to add to what was already taxable all other instruments generally known as corporate securities", begs the question involved in the process of construing Schedule A1 for the purpose of determining the present meaning of the words "bonds, debentures or certificates of indebtedness" in the light of their meaning when they stood alone in that section. The lower court does so by erroneously and categorically assuming that corporate instruments were taxable as "bonds, debentures or certificates of indebtedness" under Schedule A1 prior to 1918 "whether or not issued in registered form or with coupons attached". We contend that that assumption is without foundation and that a sound construction of the language makes for the opposite conclusion.

It is submitted that the key to that situation is to be found in the fact that, during the time when bonds and debentures were the only types of instruments specified in Schedule A1, promissory notes were specifically and separately taxed in another section of the statute. It seems to the petitioner that the distinction, for tax purposes, between the promissory

notes taxed in one section and the bonds or debentures taxed separately in Schedule A1 was not, as in the nature of things it could not be, any element of similarity between the two. The distinction, we think, resided in some attributes or characteristics which were associated with bonds or debentures, but not with promissory notes, and which were implicit in the use of "bonds, debentures or certificates of indebtedness" as words of art. It seems clear that the result of the addition of the rest of the sentence of which Schedule A1 now consists, at a time when promissory notes continued to be separately taxable, was to clarify and sharpen the difference between promissory notes and the separate classification of bonds, by identifying those characteristics of bonds, as well as of any other instruments taxed under Schedule A1, which had previously been implicit in the designation of bonds and debentures as words of art, namely, interest coupons or registered form.

Viewed in that light and in harmony with the other lower court decisions, corporate instruments are taxable under Schedule A1, whether they are dubbed bonds, debentures, notes or by any other name, if and when they are identifiable as corporate securities by reason of being issued with interest coupons or in registered form. Congress made this undeniably plain in Sec. 23 (k) of the Internal Revenue Code by classifying bonds and debentures with notes or any other evidences of indebtedness issued by a corporation with interest coupons or in registered form.

If the construction advocated by the petitioner is sound, there is no room in the statute for taxing corporate instruments issued without interest coupons or registration merely because they are long-term instruments, or because they otherwise resemble

whatever instruments may be deemed to be debentures or bonds. As it stands, the statute takes the instruments as it finds them, and if it purports to tax long-term instruments at all, it taxes only those which, however termed, are issued with interest coupons or in registered form. If the tax is to be imposed on long-term corporate instruments issued, as these were, to a narrowly limited circle of lenders, without coupons or provisions for registration and without any trust indenture, in large denominations none of which was or could be less than $100,000, and under an agreement designed to militate against or effectively prevent the sort of public distribution associated with bonds or debentures or any other kind of corporate securities issued with coupons or in registered form, it is submitted that it is for Congress, and not for the courts, to do so.

2. Final settlement of the question of the application of the stamp tax statute to these corporate instruments is desirable because of the public interest in and the importance of the question presented, as well as to remove the confusion caused by the conflict in the decisions. This involves more than merely a matter of the taxability of instruments to which the statute has not hitherto been applied, although we do not mean to minimize its value as a case of first impression in that sense. Many corporations have issued instruments similar in most of the essential features to those involved here, on the supposition that they are not taxable for the reason, if for no other, that they were issued privately without coupons or registration. Petitioner has reason to believe also that the decision of the lower court in this case is likely to result in pro-

voking the Government into assessing a stamp tax on them on the ground that the statute applies similarly to them. This Court's settlement of the question whether instruments of this type are taxable as bonds or debentures even though issued without coupons or registration will be a source of great benefit to the administration of the statute in relation to this class of instruments as well as to the corporations concerned in it, either by nipping in the bud much unnecessary litigation if, at best, they are held not to be taxable, or by causing the issue in each case to be confined to a consideration of such other distinctions as may justify classification of the instruments as notes rather than bonds or debentures.

CONCLUSION.

In view of the foregoing, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN THOMAS SMITH,
Counsel for Petitioner.

ANTHONY J. RUSSO,
Of Counsel.

September 1947.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute and regulations involved	2
Statement	4
Argument	7
Conclusion	13

CITATIONS

Cases:	
Bellefield Co. v. *Heiner*, 25 F. 2d 560	11
Danville Building Ass'n v. *Pickering*, 294 Fed. 117	8
Dauphin Deposit Trust Co. v. *United States*, 80 F. 2d 893	11
Goodyear Co. v. *United States*, 273 U. S. 100	8
Lawyers' Mortgage Co. v. *Anderson*, 67 F. 2d 889	8
Statutes:	
Internal Revenue Code, Sec. 1801 (26 U. S. C. 1940 ed., Sec. 1801)	7
Revenue Act of 1917, c. 63, 40 Stat. 300, Sec. 800, Schedule A–1	12
Revenue Act of 1918, c. 18, 40 Stat. 1057, Sec. 1100, Schedule A–1	12
Revenue Act of 1926, c. 27, 44 Stat. 9, Sec. 800, Schedule A–1, as amended	2, 7
Miscellaneous:	
Crowell, Dictionary of Business and Finance (1923), p. 169	10
VI Lough, Corporation Finance (1914)	10
Munn, Encyclopedia of Banking and Finance (1937, Revised)	10
Treasury Regulations 71:	
Art. 12	3, 8
Art. 19	3, 8

763637—47

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 347

GENERAL MOTORS ACCEPTANCE CORPORATION,
PETITIONER

v.

JOSEPH T. HIGGINS, COLLECTOR OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 63–76) is reported in 60 F. Supp. 979. The opinion of the Circuit Court of Appeals (R. 87–94) is reported in 161 F. 2d 593.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on May 14, 1947. (R. 95.) On August 13, 1947, Mr. Justice Jackson signed an

order extending the time for filing a petition for certiorari until September 15, 1947. (R. 98.) The petition for a writ of certiorari was filed on September 15, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the instruments issued by the taxpayer in 1935 to evidence a loan of $25,000,000 from eight corporations were subject to the stamp tax as bonds, debentures, or certificates of indebtedness within the meaning of Title VIII, Section 800, Schedule A–1, of the Revenue Act of 1926, as amended.

STATUTE AND REGULATIONS INVOLVED

Revenue Act of 1926, c. 27, 44 Stat. 9:

TITLE VIII—STAMP TAXES

SEC. 800. On and after the expiration of thirty days after the enactment of this Act there shall be levied, collected, and paid, for and in respect of the several bonds, debentures, or certificates of stock and of indebtedness, and other documents, instruments, matters, and things mentioned and described in Schedule A of this title * * *

* * * * *

Schedule A—Stamp Taxes

1 [as amended by Section 721 (a) of the Revenue Act of 1932, c. 209, 47 Stat. 169].

Bonds of indebtedness: On all bonds, debentures, or certificates of indebtedness issued by any corporation, and all instruments, however termed, issued by any corporation with interest coupons or in registered form, known generally as corporate securities, on each $100 of face value or fraction thereof, 10 cents: * * *

* * * * *

Treasury Regulations 71 (Revised July, 1932):

ART. 12. *Instruments issued in numbers, under a trust indenture, are bonds.*—Instruments containing the essential features of a promissory note, but issued in series, secured by a trust indenture, either in registered form, or with coupons, embodying provisions for acceleration of maturity in the event of any default by the obligor, for optional registration in the case of bearer bonds, for authentication by the trustee, and in some instances for redemption before maturity, or similar provisions, are bonds within the meaning of the statute, whether called bonds, debentures, or notes.

ART. 19. *Certificates of indebtedness.*—The term "certificates of indebtedness" includes only instruments having the general character of investment securities issued by a corporation as distinguishable from instruments evidencing debts arising in ordinary transactions between individuals.

STATEMENT

The facts which were stipulated (R. 40–55) and which were based upon certain documents offered in evidence (R. 56–62), and as found by the District Court (R. 77–81) may be summarized as follows:

The taxpayer is a New York corporation whose only business is to provide financial assistance to dealers in the products of the General Motors Corporation and to their retail customers. (R. 40, 77.) In December, 1934, the board of directors passed a resolution authorizing its officers to borrow from not more than ten investors approximately $30,000,000 on its promissory notes, provided that could be done at rates and on terms which were in the judgment of the officers "to the interests of the corporation". It was also resolved that "prior to sale of such promissory notes the officers of the corporation shall obtain the authorized statement in writing of each purchaser to the effect that its purchase is for investment account and not with the view of distribution to the public". (R. 44–45.)

The instruments described above were sold pursuant to the provisions of the resolution and subject to the opinion of counsel for the investors that the purchase of the instruments or their resale would not violate the Securities and Exchange Act of 1933 or any rule or regulation promulgated thereunder. (R. 41–42, 45, 48–49, 78–80.)

The instruments in question were unsecured and were printed on tinted paper with engraved borders. They were issued in series form, designated H to K, and each bore a serial number, but they were not issued with interest coupons or in registered form. (R. 7, Ex. A; R. 54, Ex. 4; R. 78–79.) They all bore the corporate seal of the taxpayer (R. 79) and were redeemable prior to maturity date on 60 days notice at a premium of ¼ of 1% for each six months that the term was shortened (R. 50–51). Each note provided that the taxpayer would not, so long as it was outstanding "at any time pledge or otherwise subject to a lien any of its property or assets without thereby expressly securing the due and punctual payment of this note equally and ratably with any and all obligations and indebtedness secured by such pledge", with the proviso that this restriction should not apply in case of export transactions. (R. 7, Ex. A; R. 51.) The taxpayer further agreed in each note that the authentication therein required by means of the signature of its comptroller, or of some person acting in his behalf, should not be performed "unless the Corporation at the time of such authentication owns receivables, instalment payment obligations, cash or cash on deposit to its order, pledged or unpledged, in the aggregate to an amount at least equal to the total of all its obligations outstanding, secured or unsecured, including the notes and obligations then being authenti-

cated and issued", excluding any receivable or installment payment it owned or held which had been in default for longer than 60 days. (R. 7, Ex. A; R. 51–52.) There were also provisions for acceleration of payment of principal in the event of default for 30 days in any payment of interest; or of the insolvency, bankruptcy, or reorganization of the taxpayer; or of the institution of proceedings in bankruptcy or reorganization; or of an assignment for the benefit of creditors, or the appointment of a receiver of all or substantially all of the taxpayer's property. (R. 7, Ex. A; R. 52–53.)

In 1935 the taxpayer, pursuant to the resolution described above, borrowed $25,000,000 from eight corporations and delivered to them 84 unsecured instruments ranging in face amounts from $100,000 to $1,000,000. (R. 41–42, 78–80.) In some of these instruments it promised to pay the amount stated therein to the named holder and in the others to the bearer. (R. 54, Ex. 4; R. 79.) Interest was payable on all of them at designated places at intervals of six months at 3¼%, and the principal was payable on various maturity dates, none of which was less than four and one-half years nor more than five years and one month from the date of issuance. (R. 50, 54, Ex. 4; R. 80.)

The Commissioner of Internal Revenue assessed the stamp tax on these issues which amounted in the aggregate to $25,000, on the ground that they

were taxable pursuant to the provisions of Title VIII, Section 800, Schedule A–1, of the Revenue Act of 1926, as amended by Section 721 (a) of the Revenue Act of 1932.[1] (R. 80–81.)

The taxpayer paid the tax under protest to the respondent, who was the Collector of Internal Revenue for the Third District of New York, and after claim for refund had been duly filed and rejected, brought this suit in the District Court for the Southern District of New York to recover the tax so paid. (R. 81.) The case was tried by the court without a jury on stipulated facts. (R. 63, 83.) The District Court rendered judgment for the taxpayer (R. 83), which was reversed on appeal to the court below (R. 95).

ARGUMENT

The decision of the court below is correct. Title VIII, Section 800, Schedule A–1, of the Revenue Act of 1926, as amended, *supra,* provides in part that there shall be levied a tax of 10 cents for each $100 face value of all bonds, debentures, or certificates of indebtedness issued by any corporation. The instruments in the instant case to evidence a loan of $25,000,000 to eight corporations (more than $20,000,000 of which were sold to life insurance companies) (R. 54, Ex. 4) fall within at least one of those classifications. Inasmuch as the court below de-

[1] This section corresponds to Section 1801 of the Internal Revenue Code (26 U. S. C. 1940 ed., Sec. 1801).

cided that the instruments were debentures within the meaning of the statute, we shall confine our discussion to that classification. With respect to whether the instruments could also properly be classified as bonds or certificates of indebtedness, see Articles 12 and 19 of Treasury Regulations 71, *supra.*

While the instruments in question were described in the corporate resolution and also on their face as notes (R. 7, Ex. A; R. 44–45), that description is not conclusive with respect to the application of Title VIII, Section 800, Schedule A–1. In applying a documentary tax, the form and terms of the instrument control in determining whether the instrument is subject to the tax. *Goodyear Co.* v. *United States,* 273 U. S. 100, 103, and cases cited; *Lawyers' Mortgage Co.* v. *Anderson,* 67 F. 2d 889, 890 (C. C. A. 2). The mere fact that the taxpayer labeled the instrument a "note" does not take it outside the provisions of the statute. See *Danville Building Ass'n* v. *Pickering,* 294 Fed. 117 (S. D. Ill.).

As to the form and terms of the instruments in this case, they were unsecured, printed on tinted paper with engraved borders. (R. 7, Ex. A; R. 78.) They were issued in series form designated H to K and each bore a serial number, but they were not issued with interest coupons nor in registered form. (R. 79.) They all bore the corporate seal of the taxpayer (R. 79) and were redeemable prior to the maturity date on 60 days

notice at a premium of ¼ of 1% for each six months between the redemption date and the maturity date (R. 50–51). Each note provided that the taxpayer would not, so long as the note was outstanding, "at any time pledge or otherwise subject to a lien any of its property or assets without thereby expressly securing the due and punctual payment of this note equally and ratably with any and all obligations and indebtedness secured by such pledge or other lien". (R. 7, Ex. A; R. 51.) The taxpayer further agreed in each note that the authentication therein required by means of the signature of its comptroller, or of some person acting in his behalf, should not be performed "unless the Corporation at the time of such authentication owns receivables, instalment payment obligations, cash or cash on deposit to its order, pledged or unpledged, in the aggregate to an amount at least equal to the total of all its obligations outstanding, secured or unsecured, including the notes and obligations then being authenticated and issued", excluding any receivable or installment payment it held or owned which had been in default for longer than 60 days. (R. 7, Ex. A; R. 51–52.) There were also provisions for acceleration of payment of principal in the event of default for over 30 days in any payment of interest; or the insolvency, bankruptcy, or reorganization of the taxpayer; or the institution of proceedings in bankruptcy or reorganization; or of an assignment for the benefit

of creditors or the appointment of a receiver of all or substantially all of the taxpayer's property. (R. 7, Ex. A; R. 52–53.)

The form of the instruments involved in the instant case and the provisions recited above show, as the court below decided (R. 90), that they were not ordinary promissory notes evidencing debts arising in the ordinary course of business. These instruments, with terms of 4½ to 5 years, by which the taxpayer obtained large sums of money from investors whose choice of investment, at least in the case of the insurance companies, was restricted and safeguarded by state statute, differ substantially from promissory notes used customarily in day to day commercial transactions of a short-term credit character. It also appears that the notes were purchased at a premium (R. 36, 61). Treasury Regulations 71, *supra,* promulgated in connection with the statute, do not expressly define the term "debentures", but according to text writers on corporate finance [2] the term has come to be restricted to a bond which is not secured by a lien upon any specific property. As the court below said in its opinion (R. 92–93):

> Similar definitions from similar sources may be added to the above but enough have been quoted, we think, to make it clear that these "notes" were well within the class of

[2] See VI Lough, Corporation Finance (1914); Crowell, Dictionary of Business and Finance (1923), p. 169; Munn, Encyclopedia of Banking and Finance (1937, Revised).

> investment instruments commonly called debentures and that the insistence of the treasury upon taxing them under the above statute was correct. Their terms, appearance, and method of sale to a comparatively few investors who were required to state at least their then present intention to hold them for investment purposes without transfer to others combined to put them in a class apart from ordinary commercial promissory notes and into the category of debentures as that term is used in the statute in its setting with bonds, and certificates of indebtedness, to designate a type of corporate securities which does not include ordinary promissory notes.

The decision of the court below is not in direct conflict with the decision of any other court. Of the seven cases cited in the petition (p. 5) as being in conflict with the decision of the court below, only two held that the instruments in question were not subject to tax and both of them differ in material respects from the instant case. In *Bellefield Co.* v. *Heiner,* 25 F. 2d 560 (C. C. A. 3), all of the instruments were given by the debtor to banks and all were payable in four months. In the instant case, 80% of the instruments were sold to life insurance companies (R. 54, Ex. 4) and the term was not less than four years and six months, and in some instances was slightly more than five years (R. 80). In *Dauphin Deposit Trust Co.* v. *United States,* 80 F. 2d 893 (C. C. A. 3), the instrument represented

assignment of a mortgage and its accompanying bond, which the court described (p. 896) as the purchase by an individual buyer of an individual debt. The Third Circuit also pointed out (p. 894) that the customer selects the particular mortgage he wishes to buy and sometimes visits and inspects the property before he buys the mortgage; and that he does not pool his purchase with anyone. In the instant case, however, there is no such personal transaction and no purchaser has specific security for his loan.

The taxpayer also argues that under the terms of the statute an instrument is not taxable unless it is issued with interest coupons or in registered form. (Pet. 5–14.) The legislative history of the statute shows that bonds, debentures, or certificates of indebtedness, whether or not issued in registered form or with coupons attached, had been taxed in Schedule A prior to 1918 in the paragraph entitled "Bonds of indebtedness:" See Section 800, Schedule A–1, Revenue Act of 1917, c. 63, 40 Stat. 300. In 1918 there was added for the first time the catch-all clause "and all instruments, however termed, issued by any corporation with interest coupons or in registered form, known generally as corporate securities". See Section 1100, Schedule A–1, Revenue Act of 1918, c. 18, 40 Stat. 1057. As the court below said in its opinion (R. 94):

> It seems obvious that this change was not to restrict prevailing taxation but was to

add to what was already taxable all other instruments generally known as corporate securities provided those to which taxation was extended were issued with interest coupons or in registered form.

CONCLUSION

The decision of the court below is correct and there is no direct conflict of decisions. The case depends upon the form and terms of the particular instruments. The petition for certiorari should be denied.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.
THERON LAMAR CAUDLE,
Assistant Attorney General.
HELEN R. CARLOSS,
MORTON K. ROTHSCHILD,
Special Assistants to the Attorney General.

OCTOBER 1947.

U. S. GOVERNMENT PRINTING OFFICE: 1947